IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION

CIVIL REVISION APPLICATION NO.138 OF 2004

Trisma Constructions Pvt.Ltd.,)
A company incorporated and)
registered as per the provisions of)
The Companies Act, 1956 having its)
office at Bhosale Pavillion 759/341)
Bhandarkar Road, Deccan Gymkhana,)
Pune 411 004.).. Applicant
(Org.Defendant No.10)

Versus

1. Shama Prakash Lunawat,)
Age 48 years, Occ: Business,)
residing at 50, Hemdev House,)
N.S.Patkar Marg, Mumbai 400 007.)

2. Deleted.)

3. Deleted.)

4. Deleted.)

5. Deleted.)

6. Mrs.Jayashree Kanaiyalalji)
Baphana, Age 62 years,)
Occ : residing at Dayton,)
1004 Pepper Hill Drive,)
Ohio 45429 U.S.A.)

7. Deleted.)

8. Deleted.)

9. Deleted.)

10. State Bank of India,)
a Banking Company constituted)
under the State Bank of India)
Act, 1955 having its Head Office)
at State Bank Bhavan,)
Backbay Reclamation,)

Madame Cama Road,)
Mumbai 400 023 and branch)
office amongst other branches)
at Industrial Fianance Branch)
at Wakadewadi, Pune.).. Respondents

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Shri V.V.Tulzapurkar with Ms Chandana Salgaonkar-Radia for the Applicant.

Shri Tejas Deshpande i/b Amit Karkhanis and Ms Ragini Rao for respondent No.1.

Shri V.A.Thorat, Senior Advocate, with Shri B.G.Bidan Chandran for respondent No.6.

Shri R.S.Datar for respondent No.10.

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CORAM : R.M.S.KHANDEPARKAR,J

DATED : 20th OCTOBER, 2004.

JUDGMENT:

1. Heard. Rule. By consent, the rule is made returnable forthwith. The learned advocates for the respondents waive the service. Perused the records.

2. The present revision application arises from the order dated 15th August, 2004 passed under Section 9A of the Code of civil Procedure, 1908 by the trial Court deciding the preliminary issue regarding jurisdiction of the civil Court to entertain, try and decide the civil suit No.186 of 2004 filed by the

respondent No.1. The property in question is a piece of land together with the building standing thereon bearing CTS No.42/43 situated at Shankar Seth Road, Gultekadi, Pune. The suit has been filed by the respondent No.1 praying for separation and partition of 1/15th share claimed by her in the suit property and for consequential relief that the purchase effected in favour of the petitioner by virtue of certificate issued in that regard by Debt Recovery Tribunal, Pune, under the provisions of The Recovery of Debts Due to Banks and Financial Institutions Act, 1993, hereinafter called as "the said Act", is not binding on 1/15th share of the respondent No.1 in the suit property and further that the petitioner and the respondent No.10 be restrained from developing the suit property till the respondent No.1’s share is separated by metes and bounds. The suit also relates to yet another property bearing Survey No.316 CTS No.1021 situated at Mal Aali, Chakan, Taluka - Khed, District - Pune, however, the same is not subject matter of the proceedings in relation to the absence of jurisdiction raised by the petitioner. The petitioner has already filed the written statement on 14th May, 2004. However, prior to that, the petitioner had filed the application under Section 9A of the Code of Civil Procedure as

applicable to the State of Maharashtra raising preliminary issue regarding absence of jurisdiction to the civil Court to entertain and try the suit in respect of the suit property in view of the relief in the nature of temporary injunction sought for by the respondent No.1 in the said suit.

3. It is the case of the petitioner that the suit property has been purchased by the petitioner in public auction conducted by the Recovery Officer, D.R.T., Pune, after following the entire procedure laid down in the rules comprised under the Second and Third Schedule of the Income Tax Act, 1961 (hereinafter called as "the said Rules") applicable to the sale and attachment of the suit property in terms of Section 29 of the said Act, and pursuant to the certificate of sale issued by the recovery officer, the possession of the suit property has already been taken over by the petitioner and thereby has acquired the ownership thereto, besides being a bonafide purchaser thereof, and such share certificates cannot be challenged by way of a civil suit by claiming undivided share in the suit property and the remedy, if any, lies under the said Act itself, and, therefore, the civil Court lacks jurisdiction to entertain the suit filed by the respondent No.1.

4. On the other hand, it is the case of the respondent No.1/plaintiff that the suit is for partition of the property and challenge to the petitioner's title to the suit property is limited to the extent of 1/15th share of the respondent No.1 in the suit property. The auction purchase of the suit property by the petitioner had been "as is where is basis", and hence, it cannot give title to the petitioner in respect of 1/15th share of the respondent No.1 therein. In any case, the possession by one of the co-sharers is on behalf of all the co-sharers and the petitioner was well aware of the 1/15th share of the respondent No.1 pursuant to the objection lodged by the respondent No.1 before the Recovery Officer pursuant to the public notice issued inviting objections from the interested persons. It is further contention of the respondent No.1 that the jurisdiction of Debt Recovery Tribunal under the said Act is only in respect of recovery of debts, and it does not extend to the civil rights of the parties, nor the certificate by Recovery Officer can affect the ownership rights of the respondent No.1 in the suit property and, therefore, the civil Court has jurisdiction to entertain and try the said suit.

5. It is not in dispute that in recovery proceedings initiated by the respondent No.10, consequent to the attachment of the suit property, the respondent No.1 had filed objections stating that she had no concern whatsoever with the loan transaction between the respondent No.10 - bank and the Debtor and that the respondent No.1 has acquired undivided share in the suit property by way of inheritance, though the said share has not been partitioned. The application was rejected by the Recovery Officer by his order dated 10th February, 2002 holding that, as on that day, the respondent No.1's share was not defined and co-sharers can bid at the auction and in terms of the Rule 68 of the said rules, her bid will have to be given priority over other bids, besides all the properties which are not exempted from the attachment under Section 60 of the Code of Civil Procedure were liable to be attached and sold in view of the Rule 10 of the said rules and the joint properties were not exempted from such attachment and sale. The suit property was offered for public sale on 30th April, 2003 on 'as is where is basis' by issuing public notice and proclamation of sale. On 1st October, 2003, the petitioner purchased the suit property at public auction. On 16th October, 2003, the petitioner paid entire bid amount and on 5th November, 2003, the

Recovery Officer issued order of confirmation of sale and thereafter on 6th November, 2003 issued certificate of sale in favour of the petitioner. In February, 2004, the respondent No.1 filed the present suit.

6. The trial Court considering the facts of the case, as revealed from the pleadings and materials placed before it, has held that the respondent No.1 and some of the defendants have no liability under the recovery certificate against the debtor and in favour of the respondent-bank, and therefore, they have not incurred any liability in respect of the said loan transaction between the respondent-bank and the debtor and that the suit property was never given as the security towards the loan repayment but was attached in execution of the recovery certificate against the debtor and that the respondent No.1 and some of the defendants had raised objection before the Recovery Officer but the same was dismissed without considering the contention raised therein, and therefore, the respondent No.1 was left with no alternative than to file the suit for partition; besides that the Rule 11(6) of the said rules clearly and specifically entitles an aggrieved party to file such suit and hence the civil Court has jurisdiction to entertain

the present suit.

7. The impugned order is sought to be challenged on the ground that the civil Court has no jurisdiction to entertain the suit insofar as it relates to setting aside the purchase of the suit property, since the same has been purchased by the petitioner in an auction sale conducted by Recovery Officer in exercise of the powers under the relevant provisions of the said Act read with those of the said rules. It is the contention on behalf of the petitioner that even though the Rule 11(6) of the said rules provides a remedy of suit, the same is impliedly barred in relation to the orders passed by the Recovery Officer under such Act for three reasons, firstly that there is a specific remedy of appeal provided under the said Act and thereby a complete machinery for adjudication and further for execution of the recovery certificate is available under the said Act itself; secondly that the provision of appeal under Section 30(1) specifically provides that the said remedy is available "notwithstanding anything contained in Section 29" which means that it is a non-obstante clause and though because of Section 29 the provisions of Rule 11(6) of the said rules can be otherwise resorted to, such remedy stands excluded by virtue of

the said non-obstante clause; thirdly that the point relating to bar of civil suit has already been decided by the Division Bench of this Court. While drawing attention to the various provisions of the said Act along with the said rules, reliance is placed in the decision of the Division Bench of this Court in **Keshrimal Jivji Shah & Anr. v. Bank of Maharashtra & Ors.,** reported in 2004(3) Mh.L.J. 893.

8. On the other hand the impugned order is sought to be justified on the ground that the absence of jurisdiction to the civil court is primararily in relation to the matter pertaining to the recovery of debts from the debtor to the banks and financial institutions and not pertaining to the rights of third parties to the property sought to be attached in such proceedings, and secondly that the said rules clearly permit a challenge to any decision of the recovery officer by way of civil suit and the availability of an appeal under Section 30 of the said Act does oust the jurisdiction to the civil court in that regard. It is also contended that the sale by the authorities could be to the extent of the property of the debtor and not of the stranger in which case, the exercise being beyond jurisdiction of the Recovery Officer under the said Act, the same can be challenged in the

civil Court. According to the learned advocate for the respondents, the ouster of jurisdiction of a civil Court must be clearly spelt out from the statute under which the proceedings are sought to be taken. The reliance is placed in the decisions in the matter of **Cofex Exports Ltd. v. Canara Bank,** reported in AIR 1997 Delhi 355, in the matter of **Sahebgouda (Dead) by LRs. & Ors. v. Ogeppa & Ors.,** reported in (2003) 6 SCC 151, in the matter of **Mrs.Janki Vashdeo Bhojwani & Anr. v. Indusind Bank Ltd. & Ors.,** reported in 2004 D.R.T.D.1 (SC) and in the matter of **ICICI Bank Ltd. v. V.T.Prakash & Ors.**, reported in 2004(1) Bank CLR 129(AP).

9. The basic principles of law is that a suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. (**Vide Smt.Ganga Bai v. Vijay Kumar & Ors.,** (1974) 2 SCC 393. For every cause of action, there is inherent right in the every aggrieved person to file a suit, unless specifically or impliedly barred by a statute. For maintainability of suit, no provision of law is required, but for non-maintainability of the suit, there has to be a bar prescribed either expressly or impliedly. The statutory recognition to this basic principle of law is to be found comprised under

Section 9 of the Code of Civil Procedure which empowers the civil Courts to entertain and try all suits of civil nature, except those of which cognizance by them is either expressly or impliedly barred or excluded. However, it is well settled that such exclusion is not to be readily inferred and presumption is always in favour of the existence of jurisdiction rather than exclusion thereof. Amongst various tests laid down by the Apex Court regarding exclusion of jurisdiction of Civil Court in **Dhulabhai etc. v. State of Madhya Pradesh & Anr.,** reported in AIR 1969 SC 78, two of the fundamental principles are that where the statute gives a finality to the orders of the special tribunals, the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil court would normally do in a suit, however, such provision does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure, and another one is that where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the

jurisdiction of the civil court, and where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive, and further that in the latter case, it would be necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and whether provides for all questions about the said right and liability to be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the such statute or not. In other words, in the absence of express provision in that regard, exclusion of Civil Courts' jurisdiction is not to be inferred in cases where :-

(i) the provisions of the concerned statutes are not complied with;

(ii) statutory tribunal does not act in conformity with the fundamental principles of judicial procedure;

(iii) when remedies normally associated

with actions in civil courts are not prescribed under the concerned statute.

10. One of the decisions, which is very relevant while dealing with the issue of civil Court's jurisdiction and/or bar to its jurisdiction, is in the matter of **Shiv Kumar Chadha v. Municipal Corporation of Delhi & Ors.,** reported in 1993(3) SCC 161, wherein it was ruled that if the Court is of prima facie opinion that the order passed by the authority is nullity in the eyes of law because of any "jurisdictional error" in exercise of the power by the authority or that the order is outside the relevant statute, then the suit would be maintainable. It was further held that where a particular Act creates a right or liability and also provides a forum for enforcement of such right or for protection or enforcement of a liability without any authority in law, the ouster of the Court's jurisdiction can be upheld on the finding that the rights or liabilities in question have been created by the Act without touching the pre-existing common law right and remedy provided therein is adequate and complete, but the situation will be different where a statute purports to curb and curtail a pre-existing common law right

and purports to oust jurisdiction of the Court so far as the remedy against the orders passed under such statute is concerned. The Courts have to be more vigilant while examining the question as to whether adequate redressal machinery has been provided for the aggrieved person to agitate his grievance under the concerned statute and whether, inspite of the bar placed on the power of the Court in such cases, the orders passed under such statute can be examined on "jurisdictional question".

11. In **Raja Ram Kumar Bhargava (dead) by LRs. v. Union of India,** reported in AIR 1988 SC 752, it was held that if the statute merely recognises a right pre-existing in common law and creates a new statutory remedy for enforcement thereof, without expressly excluding the civil courts' jurisdiction, it is open to the aggrieved person to elect either of the two remedies, namely, statutory or by resort to a civil Court.

12. In **Sahebgouda's case (supra),** the suit was filed claiming that the appellants were the ancestral wahiwatdar pujaris of Amogsidda Temple and therefore, entitled for pujariki rights, and the cause of action was stated to be the obstruction in the performance of

puja and taking away of some puja articles. The reliefs claimed were for a declaration that the appellants were wahiwatdar pujaris entitled to pujariki rights of performing puja and also a decree for injunction restraining the respondents from interfering with their rights. It was also pleaded that steps had been taken to get the Temple registered as a public trust with the Assistant Charity Commissioner and an inquiry in that connection had been instituted. In the background of those facts, and considering the plea of being ancestral of pujaris of temple, and not of being trustees of the Trust as well as the absence of any relief in the nature of declaration regarding the existence or otherwise of a trust or that any particular property is the property of such trust which comes within the purview of the Deputy or Assistant Charity Commissioner under the provisions of the relevant statute, it was held that:-

> "The only relief claimed is a declaration regarding the right of the appellants to function as hereditary pujaris or their pujariki rights of performing puja in the Temple and a consequential decree for injunction for restraining the respondents from interfering with the

aforesaid rights of the appellants. **The reliefs so claimed do not at all come within the ambit of Section 19 or Section 79 of the Act on which the Deputy or Assistant Charity Commissioner has the jurisdiction to hold an inquiry and give a decision."**

(Emphasis supplied)

13. It is well settled that the word "jurisdiction" has both, a ‘narrow’ as well as ‘wider’ meaning. In ‘narrow’ sense, it means the authority or the power to embark upon an inquiry in the matter in dispute. In ‘wider’ sense, it covers several aspects such as a decision being in non compliance with the provisions of the relevant statute. Obviously, a determination of a question, other than the one which directs it to decide, would be a decision not under the provisions of the relevant statute. In **Union of Indian v. Tarachand Gupta & Brothers,** reported in (1971) 1 SCC 486, it was found that the import license authorised the holder thereof to import parts and accessories of motor-cyle and scooter under the Entry No.295 of Schedule to the Import Control Order and the party accordingly had imported those parts. The

custom authorities, however, on examination of the goods, came to a conclusion that they were scooters and motor-cycles in knocked down condition, which were prohibited under Entry No.294. Considering the limited jurisdiction of the authorities to ascertain as to whether the goods imported were the spare parts under Entry No.295 or not, and not empowered to embark into a inquiry as to whether the goods, though parts and accessories, are so comprehensive that if put together would constitute motor-cycles and scooters covered by the Entry No.294, it was held that the order of the authorities was not in compliance of the provisions of the relevant statute as well as not in respect of which the authority was not vested with jurisdiction and being so, the provision excluding jurisdiction of the civil court was not applicable. Reference was also made by the Apex Court to the decision in **Secretary of State, represented by the Collector of South Arcot v. Mask and Company,** reported in 1940(67) Indian Appeals 222, wherein it was held that an order of a statutory tribunal, such as Collector or Customs under the Sea Customs Act, which statute makes final, subject of course, to an appeal provided under it, can be set aside in a suit before a civil court on two grounds, namely, when the provisions of the statute have not been complied with

and when the Tribunal has failed to act in conformity with the fundamental rules of judicial process.

14. It does not, however, mean that jurisdictional error arising out of a mere wrong decision can be subjected to judicial review by the civil Court because "at bottom the problem of defining the concept of jurisdiction for the purpose of judicial review has been one of public policy rather than one of logic", as was held by the Apex Court in **Hari Prasad Mulshankar Trivedi v. V.B.Raju & Ors.,** reported in AIR 1972 SC 2602. At the same time, it should not be forgotten that a Court or Tribunal can be said to have jurisdiction to decide a particular matter in case where it must not only have jurisdiction to try the dispute brought before it, but must also have authority to the pass order sought for. It is not enough to have jurisdiction in relation to the subject matter but it must have power to hear and decide "the question at issue", and such authority must include the power to hear and decide "particular controversy", that may arise between the parties. In the case of **Official Trustee, West Bengal and Ors. v. Sachindra Nath Chatterjee & Anr.,** reported in AIR 1969 SC 823, a settlor had asked for the Court’s permission to revoke the clause in the Trust deed empowering him to alter

the quantum of interest given to each of the beneficiaries "by will alone" and in its place to confer upon him power to make the such alteration by deed inter vivos. The Calcutta High Court ordered the revocation and granted the authority sought for. The Apex Court held that under Section 34 of the Trusts Act, 1882, the Court could have given only "opinion, advice or direction on any presented question respecting the management or administration of the trust property" and not on any other matter. The relief which was prayed for by the settlor did not relate to the management or administration of the trust property but, on the other hand, it had sought the authority to alter quantum of interest to be given to each of the beneficiaries by deed inter vivos. The Apex Court ruled that "jurisdiction conferred on the Court under Section 34 is a limited jurisdiction. Under that provision, the court has been conferred with over-all jurisdiction in matters arising under a trust deed. The statute has prescribed what the court can do and inferentially what it cannot do. From the fact that the court has been conferred power to grant only certain reliefs it follows as a matter of law that the Court has been prohibited from granting any other relief."

15. It is well settled that the existence or non-existence of jurisdictional fact would decide the empowerment or non-empowerment of the Court or Tribunal or authority constituted under a particular statute to entertain, deal with and decide a particular case or matter. In **Smt.Shrisht Dhavan v. M/s.Shaw Brothers,** reported in AIR 1992 SC 1555, it was held that "no statutory authority or tribunal assumes jurisdiction in respect of subject matter which the statute does not confer on it and if by deciding erroneously the fact on which the jurisdiction depends the Court or Tribunal exercises jurisdiction, then the order stands vitiated. Error of jurisdictional fact renders the order ultra vires and bad (Wade : Administrative Law). In **Raza Textiles Ltd. v. Income Tax Officer, Rampur,** (1973) 1 SCC 633: (AIR 1973 SC 1362), it was held that a Court or Tribunal cannot confer jurisdiction on itself by deciding a jurisdictional fact wrongly." At the same time, it was also clarified that "error in assumption of jurisdiction should not be confused with mistake, legal or factual in exercise of jurisdiction. In the former, the order is void, whereas, in the later, it is final, unless set aside by the higher or competent court or authority. **An order which is void can be challenged at any time in any proceeding."**

(Emphasis supplied)

16. Undoubtedly, since the bank and financial institutions were experiencing considerable difficulties in recovering the loans and enforcement of securities charged with them, and since they needed new mechanism for expeditious adjudication and recovery of debts, the said Act came to be enacted. The preamble of the said Act reads that "an Act to provide for the establishment of Tribunals for expeditions adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto." The said Act does not disclose creation of any new right or liability. It merely purports to regulate existing rights and liabilities relating to debts to the banks and financial institutions for the purpose of expeditious adjudication and recovery of such debts due to banks and financial institutions and for matters connected therewith or incidental thereto. The right and liability relating to debts to banks and financial institutions existed since the time immemorial, but with the expansion of volume of work relating to the debts advanced as well as recovery thereof and other incidental issues relating thereto,

regulation and provision for speedy recovery of such debts was found absolutely necessary and consequently, the said Act came to be enacted to provide effective machinery in attaining the said objective.

17. Section 18 of the said Act deals with the subject of bar of jurisdiction and it provides that, on and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to the matters specified in Section 17. The provision of law relating to bar of jurisdiction in Section 18 of the said Act therefore, is related to the issues which are covered by Section 17 and does not travel beyond the scope of the subject matter described under the said Section 17 of the said Act.

18. Section 17 of the said Act speaks of jurisdiction, powers and authority of tribunal under the said Act. Sub-section (1) thereof provides that a Tribunal shall exercise, on and from the appointed day, the jurisdiction, power and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to

such banks and financial institutions. The subject described for exercise of jurisdiction of Tribunal under Section 17, therefore, is an application for recovery of the debts due to banks and financial institutions. Obviously, it does not relate to any other subjects. It is pertinent to note that the expressions "application", "bank", "financial institution" as well as "debt" are specifically defined under Section 2 of the said Act. In terms of Section 2(g), 'debt' means any liability inclusive of interest which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application. The term 'application' has been defined under Section 2(b) to mean an application made to a Tribunal under Section 19 of the said Act. The expressions 'bank' and 'financial institution' are defined under Section 2(d) and 2(h), respectively. It is, therefore, clear that the tribunal's jurisdiction

under Section 17 of the said Act is confined to deal with the issue relating to the recovery of debts to the banks and financial institutions as specified under the said Act and such jurisdiction cannot travel beyond the scope of such subject of debt recovery specified and defined under the said Act. Undoubtedly, in the proceedings initiated by filing an "application" under Section 19 of the said Act, the same would invariably include a claim for set-off as well as counter-claim in the nature of damages or otherwise as is provided under sub-sections (6) and (8) thereof. However, such counter-claim has necessarily to be on account of the sum due and payable to the debtor or his representative by the banks or financial institutions. Considering the provisions of Section 17, any such set-off or counter-claim has to confine to the subject covered by the said provisions of law, as the jurisdiction of the Tribunal is confined to those limits, and, therefore, it cannot relate to any subject other than money transaction between the bank and the financial institution on one side and the debtor or his representative on the other side and the matters incidental thereto. The issue which can be raised under the said Act by way of counter-claim before the tribunal, therefore, is necessarily to be directly or

indirectly relating to the debt due to the bank or financial institution or similar claim in favour of the debtor and against the bank or the financial institution. The Legislative intent in this regard is also clear from Section 19(11) of the said Act which provides that where a defendant sets up a counter-claim and the applicant contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent action, the applicant may, at any time before issues are settled in relation to the counter-claim, apply to the Tribunal for an order that such counter-claim may be excluded, and the Tribunal may, on the hearing of such application, make such order as it thinks fit. The said sub-section speaks of exclusion of counter-claim which needs to be disposed of as "an independent action". The expression "independent action" has not been defined under the said Act but certainly considering the scope of the jurisdiction of Tribunal under Section 17, the Tribunal does not have power to deal with any such independent action and obviously, it would be in the nature of a civil suit to be tried by the civil court, unless specifically barred or required to be tried by any other Tribunal or Court established under any special statute. The bar of the jurisdiction of civil court to entertain a suit

contemplated under Section 18 is, therefore, limited to the issues relating to the debt to the banks and financial institutions and the matters incidental thereto which are to be dealt with by the Tribunal in terms of Section 17 of the said Act. Needless to say that the term "debtor" would include the guarantor or surety or any person acting under or through or on behalf of the debtor.

19. The procedure to be followed for exercise of jurisdiction and power under Section 17 as well as for issuance of the final order to be passed in the proceedings on exercise of such jurisdiction is provided in Chapter IV and it commences with an application to be made under Section 19 provided thereunder. Sub-section (1) of Section 19 provides that where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of whose jurisdiction either the defendant or defendants, as the case may be, actually and voluntarily resides or carries on business or personally works for gain, or where the cause of action, wholly or in part, arises. The term "the defendant" obviously refer to the debtor or the guarantor or the person from whom the debt amount is legally recoverable or to be

recovered. When the ultimate order for payment is passed in such proceedings directing the payment of debt due to the banks or financial institutions, then on the basis of such final order of the Tribunal, the Presiding Officer has to issue a certificate to the Recovery Officer for the purpose of recovery of the amount of debt specified in such certificate. That is the provisions of law comprised under Section 19(22) of the said Act.

20. The provisions relating to the execution of the recovery certificate are to be found in Chapter V of the said Act. Sections 25 and 28 of the said Act in the said Chapter V provides different modes of execution by the Recovery Authority. Section 25 provides that the Recovery Officer shall, on receipt of the copy of the certificate under sub-section (7) of section 19, proceed to recover the amount of debt specified in the certificate either by way of attachment and sale of the movable or immovable property of the defendant, or arrest of the defendant and his detention in prison, or appointing a receiver for the management of the movable or immovable properties of the defendant. Without prejudice to the modes of recovery specified in Section 25, the provision of law comprised under section 28 provides

for some other modes of recovery of debts. Sub-section (2) of Section 28 provides that if any amount is due from any person to the defendant, the Recovery Officer may require such person to deduct from the said amount, the amount of debt due from the defendant under the said Act and such person shall comply with any such requisition and shall pay the sum so deducted to the credit of the Recovery Officer. Proviso thereto states that nothing therein shall apply to any part of the amount exempt from attachment in execution of a decree of a civil court under section 60 of the Code of Civil Procedure. Sub-section (3)(i) thereof provides that the Recovery Officer may, at any time or from time to time, by notice in writing, require any person from whom money is due or may become due to the defendant, or to any person who holds or may subsequently hold money for or on account of the defendant, to pay the same to the Recovery Officer. Clause (ii) of sub-section (3) provides that a notice under the said sub-section may be issued to any person who holds or may subsequently hold any money for or on account of the defendant jointly with any other person and for the purposes of the said sub-section, the shares of the joint holders in such amount shall be presumed, until the contrary is proved, to be equal. Sub-section (4) of Section 28

provides that the Recovery Officer may apply to the court in whose custody there is money belonging to the defendant for payment to him of the entire amount of such money or if it is more than the amount of debt due, an amount sufficient to discharge the amount of debt so due. Sub-section (4A) provides that the Recovery Officer may, by order, at any stage of the execution of the certificate of recovery, require any person, and in case of a company, any of its officers against whom or which the certificate of recovery is issued, to declare on affidavit the particulars of his or its assets. Sub-section (5) provides that the Recovery Officer may recover any amount of debt due from the defendant by distraint and sale of his movable property in the manner laid down in the Third Schedule to the Income Tax Act, 1961.

21. Section 29 of the said Act, which is very relevant for the decision in the matter, provides that the provisions of the said rules, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said rules referred to the amount of debt due under the said Act instead of the Income-tax, and any reference under the said rules to the "assessee" shall be construed as a reference to the defendant under the said Act.

Section 30(1) of the said Act provides that notwithstanding anything contained in section 29, any person aggrieved by an order of the Recovery Officer made under the said Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal.

22. Considering the relevant provisions of the said Act read with the said rules, it cannot be disputed that the same provide for a complete machinery for adjudication and execution of the order passed in an adjudication relating to the subject covered by Section 17 of the said Act and the civil Court’s jurisdiction to that extent would be certainly barred. While Chapter IV prescribes complete procedure for adjudication of dispute and Chapter V deals with the execution and implementation of the final order, based on such adjudication. Section 30 of the said Act indeed opens with non-obstante clause and it obviously presents an overriding effect particularly over the provisions of Section 29 of the said Act. Undoubtedly, the rule 11(6) under the said rules could apply to the execution proceedings under the said Act only by virtue of the provisions of law comprised under Section 29 of the said Act, and not otherwise. It is but natural, therefore, that the

provisions of Section 30 of the said Act would apply to such proceedings. Considering the said overriding effect of the appellate remedy under Section 30, the contention that the remedy of civil suit under the rule 11(6) of the said rules would stand barred in view of the provisions of law under Section 18 relating to bar of jurisdiction to entertain civil suit would obviously appear to be of great substance. However, any finding in that regard would be incomplete statement of law and perhaps would be per incurium, if one ignores not only the provision of Section 17 of the said Act but also proper analysis of Rules 9, 11 and 86 of the said rules before taking any decision in that regard.

23. Undoubtedly, therefore, in the course of execution of the recovery certificate, the Recovery Officer is empowered to exercise the power under the said Act and to follow the procedure prescribed under the said rules. Rule 11 of the said rules deals with the subject of investigation by Recovery Officer. Sub-rule (1) thereof provides that where any claim is preferred to, or any objection is made to the attachment or sale of, any property in execution of a certificate, on the ground that such property is not liable to such attachment or sale, the Recovery

Officer shall proceed to investigate the claim or objection, provided that no such investigation shall be made where the Recovery Officer considers that the claim or objection was designedly or unnecessarily delayed. In other words, in case where the recovery officer considers that the claim or objection has been made with the intention merely to delay the execution proceedings or that there is unreasonable delay in making the claim or objection then the recovery officer is not duty bound to investigate into the claim or objection and, therefore, he can reject the claim or objection.

24. Sub-rule (2) of Rule 11 provides that where the property to which the claim or objection applies has been advertised for sale, the Recovery Officer ordering the sale may postpone it pending the investigation of the claim or objection, upon such terms as to security or otherwise as the Recovery Officer shall deem fit. This provision of law obviously empowers the recovery officer to give breathing time to the claimant or objector till the investigation is completed by the recovery officer in respect of the claim or objection. During such period, the recovery officer may postpone the sale of the attached property on such terms as to security or

otherwise as he may deem fit. In other words, in order to avoid multiplicity of proceedings or irreparable loss to the claimant or objector, certainly the recovery officer may take appropriate steps to maintain status quo for some period till the investigation is completed.

25. Sub-rule (3) provides that the claimant or objector himself must adduce evidence to show that - at the date of the service of the notice issued under the said rules to pay the arrears in the case of immovable property, or at the date of the attachment in the case of movable property that such claimant or objector had some interest in, or was possessed of such property. This rule briefly specifies the methodology for placing the claim or objection before the recovery officer. Accordingly, the claim or objection should disclose either interest in or possession of the property in favour of the claimant or objector on the date of the service of the notice issued under the said rules to pay the arrears in case of immovable property and on the date of attachment of such property in case of movable property. This sub-rule, therefore, merely deals with the requirements to be complied with by the claimant or objector to enable the recovery officer to form

necessary opinion and to take appropriate decision in terms of the sub-rules (4) or (5), as the case may be.

26. Sub-rule (4) provides that where, upon the said investigation, the Recovery Officer is satisfied that, for the reason stated in the claim or objection, such property was not, at the said date, in the possession of the defaulter or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the defaulter at the said date, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Recovery Officer shall make an order releasing the property, wholly or to such extent as he thinks fit, from attachment or sale. The said provision deals with a situation in which the recovery officer is empowered to release the property wholly or to the extent he thinks fit from the attachment or sale thereof. It contemplates three eventualities which are specified therein for exercise of such power. One of the eventualities contemplated is when the possession of the property is found with the defaulter or with some other person under or on his behalf; the second eventuality is when the

property is in possession of the defaulter on behalf of someone else and not on his own account, and thirdly when such possession is partly on his own account; and partly on account of others. Depending upon the eventuality, the recovery officer has to take decision relating to release of whole or part, as he deems fit, the attachment or sale thereof. Apparently, therefore, the order of release spoken of under this sub-rule is in case of the last two eventualities, and in case of the first eventuality, the procedure would be as prescribed under the sub-rule (5).

27. Sub-rule (5) provides that where the Recovery Officer is satisfied that the property was, at the said date, in the possession of the defaulter as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Recovery Officer shall disallow the claim. In other words, when the property is in possession or control of the defaulter, the objection or claim is liable to be disallowed.

28. The sub-rule (6) of rule 11, which is very relevant for the decision in the matter, provides that

where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Recovery Officer shall be conclusive. This sub-rule therefore reserves right in favour of the claimant or objector to approach the Civil Court in case he is aggrieved by the order that may be passed by the recovery officer in exercise of his power relating to execution of the recovery certificate. It also specifies that in a case where the aggrieved party files suit against an order passed by the recovery officer in respect of the claim or objection putforth in the matter of execution of recovery certificate then such order shall not be conclusive till the Court passes the final decision in the matter. It is to be noted that this provision which empowers the aggrieved party to approach the Civil Court has been enacted along with the provision for appeal against such order of the recovery officer, and the said provision for appeal is to be found in the rules 86 of the said rules.

29. The rule 86 of the Second Schedule of the Income Tax Act, 1961 which deals with the subject of

appeals. Sub-rule (1) of Rule 86 provides that an appeal from any original order passed by the Recovery Officer under the said rules, not being an order which is conclusive, shall lie to the Chief Commissioner or Commissioner. Sub-rule (2) provides that every appeal under this rule must be presented within thirty days from the date of the order appealed against. Further, the rule 87 deals with the subject of Review, and it provides that any order passed under the said rules may, after notice to all persons interested, be reviewed by the Chief Commissioner or Commissioner, Recovery Officer or other officer who made the order, or by his successor in office, on account of any mistake apparent from the record. The aggrieved party therefore is not prohibited from exhausting the remedy of appeal under Rule 86 prior to approaching the civil Court by way of suit in terms of Rule 11(6). However, if the order of recovery officer attains conclusiveness, it cannot be subjected to an appeal. As far as the said Act is concerned, the provision regarding the appeal is under Section 30. Therefore, obviously, the said provision of Section 30 would prevail over Rule 86 of the said rules. Therefore, considering the provisions of Sections 29 of the said Act, which speaks of transplantation of the provisions under the said rules in the said Section, would not

include Rule 86 as the provision regarding the appeal are to be found in Section 30, notwithstanding the provisions of Section 29. Section 29 of the said Act which transplants the provisions of the said rules in the said Act, itself uses the phrase "as far as possible", while Section 30 opens with non-obstante clause with reference to Section 29. Consequently the appeal remedy under Section 30 would override the provisions of Rule 86 of the said rules. Even though the rule 86 stands transplanted in the said Act by virtue of the provisions in Section 29, yet on account of non-obstante clause in Section 30 with reference to Section 29 and the phrase "as far as possible" used in Section 29, the appeal remedy under Section 30 would override the similar remedy under rule 86 of the said rules.

30. It is also necessary to note at this stage itself the provisions under Rule 9 of the said Rules. The rule 9 thereof provides that every question arising between the Recovery Officer and the defaulter or their representatives, relating to the execution, discharge or satisfaction of a certificate or relating to the confirmation or setting aside by an order of a sale held in execution of such certificate by the Recovery Officer shall be determined, not by suit, but

by order of the Recovery Officer before whom such question arises, provided that a suit may be brought in a civil court in respect of any such question upon the ground of fraud. This rule therefore categorically safeguards the powers of the recovery officer to deal with and determine all the questions arising in relation to execution, discharge or satisfaction of the recovery certificate and not by way of suit, except in case of fraud. However, there is one restriction imposed, while considering such question by the recovery officer and the same is that such question must arise between the recovery officer and the defaulter. It does not speak of any third party or the one who has no concern with the debt or the subject which would fall outside the scope of powers under Section 17 of the said Act. Beside, this provision is to be found, apart from the provisions, under Rule 11(6) as well as Rules 86 and 87 of the said rules.

31. The Rule 11 of the said rules, therefore, empowers the recovery officer to investigate into the claim or objection and authorises the recovery officer to exclude the property wherein the debtor has no right or interest in such property or to the extent he does not have any right or interest in such property.

Undoubtedly, the provision merely authorizes the exclusion of the property wherein the debtor does not have any interest or right. The power does not travel beyond the exclusion of such property from the attachment for sale. Besides, certainly if the recovery officer finds the claim or objection to have been made designedly or unnecessarily to delay the execution proceedings, the same can be rejected in exercise of powers under Rule 11(1). What is the effect of such rejection of claim or objection ? Certainly, it can be subjected to an appeal. But the power of the appellate authority cannot travel beyond the scope of the powers of the original authority. Does it mean that once the claim or objection is rejected on the ground of delay, the third party would loose its right to such property or would it deprive the third party from its claim to such property and/or would it by itself deny the claim of a third party to the property without its right to the property being adjudicated at all ?

32. The authority of the Recovery Officer under sub-rule (4) of Rule 11 which empowers him to exclude the property wherein the debtor has no interest or right, does not permit such officer to deal with such excluded property or right of the third party to such

property though the Recovery Officer can deal with such property to the extent of the debtor's interest therein as well as when the property is either of the guarantor or such property was the subject matter of guarantee or security for repayment of the debt. In other words, on exclusion of the third party's property, the remaining property having therein the interest or right of the debtor on guarantor or being subject matter of the security for repayment of the debt, certainly can be dealt with in accordance with the provisions of law for the purpose of executing the recovery certificate. This is in consonance with the provisions of law comprised under Section 25 of the said Act which clearly empowers the recovery officer to recover the amount of debt specified in the recovery certificate by way of attachment and sale of the property of the debtor. But, similar power cannot be exercised by the Recovery Officer in relation to the property belonging to the third party, or the property which is in no way related to the debtor or the debt which was the subject matter of adjudication under Section 17 of the said Act.

33. As already pointed out earlier, the bar of jurisdiction under Section 18 directly and exclusively relates "to the matters specified in Section 17" and

such specified matters are found to be the "applications from banks and financial institutions" for recovery of debt due to such banks and financial institutions. Unhasitently, therefore, it can be said that in the case of all disputes relating to the debt, as defined under Section 2(g), instituted by the bank as defined under Section 2(d), and/or the financial institutions as defined under Section 2(h) of the said Act, by filing an application to a Tribunal under Section 19 of the said Act, the jurisdiction to deal with all the issues arising in such disputes and relating to such debt will have to be decided exclusively by the Tribunal under the said Act, as well as the questions arising between the parties or those claiming under them relating to the execution, discharge or satisfaction of the recovery certificate shall be determined by the Recovery Officer and any decision of such Recovery Officer could be subjected to an appeal provided under Section 30 and by further appeal to Debt Recovery Appellate Tribunal under Section 20 of the said Act and cannot be challenged by way of a civil suit as the same would be barred under Section 18 read with Section 30 of the said Act. However, it needs to be clarified that the said bar of jurisdiction cannot travel beyond the scope of the dispute as circumscribed under Section 17 read with

Rules 9 and 11 and particularly sub-rules (1), (4) and (6) of the said rule 11. The scope and limit of this bar of jurisdiction is made more clear by non-obstante clause in Section 30 read with Section 18 of the said Act, wherein the provision regarding exclusion of civil court's jurisdiction is apparently limited to the subject covered by Section 17 of the said Act and by Rule 9 of the said rules which relates to all the questions arising between the defaulters or their representatives relating to execution, discharge or satisfaction of the certificate of recovery and of order of sale therein as well as by the said Rule 11(4) which provides for exclusion of the third party's property read with the said Rule 11(6) which makes the decision of Recovery Officer conclusive subject to the result of the suit thereunder. The said Rule 9 refers to "the defaulter or their representatives" and to the "order of sale **therein**" in respect of bar of suit while excluding therefrom the cases of fraud. The Rule 11(6) refers to "the party against whom" while reserving the right to challenge order of Recovery Officer on the objection or claim by "objector or claimant" referred to in Rule 11(1) and Rule 11(3) read with Rule 11(4) by way of civil suit, further specifying that the order of Recovery Officer shall be conclusive subject to the result of such

suit. Inspite of the law on the point being abundantly clear, for the reasons stated above, it is the contention of the petitioner that the law has been settled to the contrary by the decision of the Division Bench in **Keshrimal Jivji Shah's case (supra).** The contention of the petitioner, however, is devoid of substance.

34. The Division Bench of this Court in **Keshrimal Jivji Shah's case (supra),** wherein heavy reliance is placed by the learned advocate for the petitioners in support of the contention about the ouster of the civil Court's jurisdiction has, undoubtedly, while dealing with the issue as to whether and to what extent, the procedure under Rule 11 of said rules is applicable in execution of a recovery certificate issued under the said Act has held that "the Parliament does not make it mandatory nor compulsory for the recovery officer to apply the second and third Schedule of I.T. Act and 1962 Rules, advisedly because the Legislature has provided safeguards after investigation of claims and objections by recovery officer. This investigation can be challenged in Appeal under section 30 of the Act which has been substituted with effect from 17th January 2000. Even proceedings in such appeal are not final because

section 20 of R.D.B.Act provides for a further appeal by person aggrieved against any order made or deemed to have been made by a Tribunal under R.D.B.Act. Such an appeal lies to the Debt Recovery Appellate Tribunal. To compel banks or financial institutions to either institute or defend proceedings after all this before a Civil Court is defeating and frustrating the Legislative intent completely. Investigation and adjudication cannot be endless. That apart, the remedy to approach this Court in appropriate cases by invoking its jurisdiction under Articles 226 and 277 of the Constitution of India is always available." The Division Bench therefore has clearly held that there is a complete machinery provided under the said Act to deal with the matters arising out of the debt liability to the banks and financial institutions right from the adjudication of all the questions relating thereto including the actual implementation of the order passed on such adjudication. However, much stress has been laid on the observations by the Division Bench to the effect that ".....it is not obligatory to apply second and third schedule of I.T.Act, 1962 Rules while investigating a claim or objection to attachment and sale during the course of execution of recovery certificate under R.D.B.Act", to contend that the provisions of Rule 11(6) are not

available to the aggrieved parties and it is for the recovery officer to decide what procedure which he has to follow. It is pertinent to note that the said observations are to be read with :-

> "Whenever, the Legislature says as far as practicable, as far as possible it conveys one and the same meaning. If the purpose of RDB Act is to expediently recover public monies in a summary manner then an interpretation which would advance this purpose should be placed on section 29 of R.D.B.Act. So interpreted and considered, in our view, it will not be possible to read provisions of second schedule and more particularly Rule 11 in their entirety in section 29. **They will have to be read as far as possible and with such modifications as the facts and circumstances of a case and the nature of an investigation require.** Though it is not possible or advisable to lay down a general rule in this behalf. However, Rule 11 need not be completely adhered to by the Recovery Officer always."
>
> (Emphasis supplied)

The the Division Bench has therefore ruled that the provisions of the said rules and in particular Rule 11 thereof should be read into Section 29 of the said Act "as far as possible", and "with such modifications", depending upon "facts and circumstances of a case", and the nature of investigation requires". Obviously this ruling has been given in relation to investigatory powers of the recovery officer under the said Act and bearing in mind that the said rules do not cover all the eventualities. There may be cases where the nature of claim or objection may require certain modifications in the process of investigation. Undoubtedly, it is the settled principle that the authorities have to function in accordance with the procedure prescribed by the statute under which such authorities are created and have to act within the parameters of powers and scope of jurisdiction given to them by the concerned statute, yet bearing in mind the object and the purpose for which the statute has been enacted, the same cannot be allowed to be defeated on technicalities and for the impish delight of the unscrupulous elements who may keep the banks and financial institutions busy entangled with unending civil litigations on one ground or the other. It was, therefore, observed by the Division Bench

that:-

> "If the contentions of Shri Naphade are accepted, it would result in investigation of claim or objection to attachment and sale never achieving any finality in proceedings under R.D.B.Act. If outcome of such investigation is made subject to another round of litigation by way of civil suit, then the very purpose of establishing Tribunals and creating machinery for speedy and expeditious recovery of public monies would be defeated. If Banks and financial institutions are made to face another round of litigation in the form of civil suit after consideration of the claim to attachment and sale then it will be impossible for them to recover and realise their dues."

Evidently, the observations are in a matter wherein the property, which was the subject matter of the dispute, was subjected to security for repayment of the debt and it was not a case of third party right to the attached property.

35. It is well settled that while understanding the ratio of a decision delivered either by the Supreme Court or the High Court, it is always to be borne in mind that the ruling is to be understood with reference to the facts of the case, the points which were required to be decided in those facts, the rival contentions raised by the parties, and the conclusions arrived at in the decision by the Court. The Apex Court in **Union of India & Ors., v. Dhanwanti Devi & Ors.,** reported in (1996)6 SCC 44, has clearly explained the method of carving out the ratio of a decision. Picking and citing one or two sentences from here and there from a judgment would not by itself constitute a ratio of the judgment. It is well settled that "it is trite that any observation made during the course of reasoning in a judgment should not be read divorced from the context in which they were used "**(vide: State of Gujrat & Ors. v. Akhil Gujrat Pravasi V.S.Mahamandal & Ors.,** reported in 2004 AIR SCW 3665). It is also well settled that "a judgment should be understood in the light of facts of that case and no more should be read into it then what it actually says. It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court divorced from the context of the question under consideration and treat it to be

complete law decided by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the Court." (**Vide : Mehboob Dawood Shaikh v. State of Maharashtra, 2004 AIR SCW 527 AND Commissioner of Income Tax v. Sub Engineering Work (P) Ltd.:** 1992(4) SCC 363). Bearing in mind the law of precedents, in order to understand the ratio of the decision in **Keshrimal Jivji Shah's case (supra)**, it would be necessary to know the facts of the said case, and the questions which were considered therein with reference to those facts.

36. In **Keshrimal Jivji Shah's case (supra),** the Bank of Maharashtra had filed the suit for recovery of amount of Rs.50 lakhs and odd from the respondent Nos.2 to 5 in the said petition who were original defendants in the suit. It was the case of the Bank that on 3rd November, 1988, the agreement for lease was entered into by City Industrial and Development Corporation (CIDCO) in favour of the debtor. The lease was in respect of property being warehouse plot admeasuring 900 sq. mtrs. situate at Kalamboli, Vashi, Navi Mumbai. The debtor had deposited on 30th November, 1988 title deeds in respect of the said property with the bank with the intention to create

equitable mortgage in respect of the said property in favour of the bank. As a result of persistent defaults committed by the debtor in repayment of loan, the bank instituted the said suit for recovery thereof and for certain other reliefs. During the pendency of the suit in a Notice of Motion, the learned Single Judge of this Court had granted temporary injunction restraining the debtor from alienating, transferring or creating any third party interest in the said property. On establishment of the Debt Recovery Tribunal, the suit was transferred to its file, and as it had proceeded ex parte, recovery certificate came to be issued by the Tribunal. During the pendency of the proceedings, it appears that the debtor transferred and assigned its leasehold rights in favour of the petitioner No.2 in the said petition under a document which was registered on 29th August, 2000. Prior to that, CIDCO had granted a lease deed in favour of the debtor on 28th July, 2000 which was registered on 4th August, 2000 and it had empowered the debtor to transfer its right and title in the said property in favour of the petitioner No.2. On or about 8th October, 2002, the petitioners in the said petition came to know that the said property was to be put to auction on 10th October, 2002, pursuant to directions of Recovery Officer of DRT-II and that was

sought to be objected by filing an intervention application. The Recovery Officer rejected the application. Being aggrieved by the said rejection of the intervention application, the petitioners therein preferred an appeal before the Debt Recovery Tribunal which was dismissed. Being aggrieved, the petitioners preferred the appeal before Debt Recovery Appellate Tribunal, which was also dismissed on 9th February, 2004, and the same was sought to be challenged by way of the writ petition. Before the Division Bench, apart from other contentions, it was sought to be argued that "even if tax recovery officer is satisfied that the claim or objection is not substantiated even then his conclusion is not final and is subject to a civil suit as contemplated by Rule 11(6)". It is, therefore, apparent that the dispute which was sought to be adjudicated before the Tribunal by the petitioners in **Keshrimal Jivji Shah's case**, was essentially between the assignees of the debtor in relation to the later's right in the property which was the subject matter of mortgage to the bank towards the security for repayment of the debt. The dispute was not sought to be raised by any third party or a person who has no concern whatsoever either to the debt or its recovery, or by the person who is in no way concerned with the property in question which was

the subject matter of the security for repayment of the debt. The proceedings were exclusively between the bank, debtor and assignee of the debtor in relation to the property of the debtor which was the subject matter of the security towards the repayment of the debt. All the parties to the proceedings were directly or indirectly concerned with the subject matter, or the incidental thereto, covered under Section 17 of the said Act. Being so, the ruling of the Division Bench in **Keshrimal Jivji Shah's case** may apply to the cases wherein the decision of the Recovery Officer or the Tribunal relates to the property belonging to or which belonged to the debtor and/or which was subject matter or related to the security for repayment of debt or to a matter between the debtor or any person claiming under or through him and in relation to the debt. Undoubtedly, the debtor would include his guarantor. However, the decision cannot apply to a case wherein the property is of the totally stranger to the debt transaction or the subject which is not covered under Section 17 of the said Act or to a case wherein a property of a third party unconcerned with the debt liability in any manner is sought to be attached and/or sold for recovery of the debt amount. It is a well settled law that a decision is what it decides and not what may

merely follow from it. The observation by the Division Bench that "if the contention of Shri Naphade are accepted, it would result in investigation of claim or objection to attachment and sale never achieving any finality in proceedings under R.D.B.Act" has to be considered in the facts and circumstances of the case before the Division Bench. This is further clear from the decision of the Apex Court in **Allahabad Bank vs. Canara Bank & Anr.,** reported in AIR 2000 SC 1535, which was also relied upon by the division bench of this Court while delivering the judgment in **Keshrimal Jivji Shah's case (supra).**

37. In **Allahabad Bank v. Canara Bank & Anr.(supra),** while dealing with the issue as to whether in respect of the proceedings under the said Act at the stage of adjudication for money due to the banks and financial institutions and at the stage of execution of the recovery of money under the said Act and the Tribunal and the Recovery Officer are conferred with exclusive jurisdiction in their respective spheres, it was held that :-

> "In our opinion, the jurisdiction of the Tribunal in regard to adjudication is exclusive. The RDB Act requires the Tribunal

alone to decide applications for recovery of debts due to Banks or financial institutions. Once the Tribunal passes an order that the debt is due, the Tribunal has to issue a certificate under Section 19(22) (formerly under section 19(7)) to the Recovery Officer for recovery of the debt specified in the certificate. **The question arises as to the meaning of the word "recovery" in Section 17 of the Act. It appears to us that basically the Tribunal is to adjudicate the liability of the defendant and then it has to issue a certificate under Section 19(22). Under Section 18, the jurisdiction of any other Court or authority which would otherwise have had jurisdiction but for the provisions of the Act, is ousted and the power to adjudicate upon the liability is exclusively vested in the Tribunal.** (This exclusion does not however apply to the jurisdiction of the Supreme Court or of a High Court exercising powers under Article 226 or 227 of the Constitution). This is the effect of Sections 17 and 18 of the Act."

(Emphasis supplied)

Highlighting the limited scope of jurisdiction of the Tribunal under the said Act, it was held that :-

> "We hold that the provisions of Sections 17 and 18 of the RDB Act are exclusive so far as the question of adjudication of the liability of the defendant to the appellant Bank is concerned."

Dealing with the issue relating to the proceedings for execution of the recovery certificate by the Recovery Officer and the scope of his powers, it was held that:-

> "Even in regard to 'execution', the jurisdiction of the Recovery Officer is exclusive. Now a procedure has been laid down in the Act for recovery of the debt as per the certificate issued by the Tribunal and this procedure is contained in Chapter V of the Act and is covered by Sections 25 to 30. **It is not the intendment of the Act that while the basic liability of the defendants is to be decided by the Tribunal under Section 17, the Banks/Financial institutions should go to the**

> **Civil Court or the Company Court or some other authority outside the Act for the actual realisation of the amount.** The certificates granted under Section 19(22) has, in our opinion, to be executed only by the Recovery Officer. **No dual jurisdictions at different stages are contemplated.**"
>
> (Emphasis supplied.)

. Referring to Section 34 of the said Act, it was held that : -

> "The provisions of section 34(1) clearly state that the RDB Act overrides other laws to the extent of 'inconsistency'. In our opinion, the prescription of an exclusive Tribunal both for adjudication and execution is a procedure clearly inconsistent with realisation of these debts in any other manner."

While emphasizing the limited scope of jurisdiction of the Tribunal under the said Act and the exclusion of the Civil Court's jurisdiction to that extent, it was held that:-

> "Thus, **the adjudication of liability and the recovery of the amount by execution of the certificate are respectively within the exclusive jurisdiction of the Tribunal and the Recovery Officer** and no other Court or authority much less the Civil Court or the Company Court can go **into the said questions relating to the liability and the recovery except as provided in the Act."**
>
> (Emphasis supplied)

38. The Apex Court has clearly ruled that it is the basic liability of the debtor that is to be decided by the Tribunal under Section 17 of the said Act and in that regard, the jurisdiction of the civil Court or any other authority outside the said Act for actual realisation of the amount is excluded in view of the fact that such jurisdiction has been given to the Recovery Officer. The clear ruling of the Apex Court reads "basically the Tribunal is to adjudicate the liability of the defendant and then it has to issue a certificate under Section 19(22)" and further "no dual jurisdiction **at different stages are contemplated"**. (Emphasis supplied). This ruling apparently discloses that the Apex Court in no

uncertain terms has laid down the law that in relation to the subject of recovery of debt, the same has to be done by the Tribunal in exercise of power under the said Act, and the jurisdiction in that regard is exclusive, not only for adjudication of rights and liabilities relating to the debt and the incidental matters thereto but also in respect of execution of the order passed on conclusion of such adjudication. However, it cannot be disputed that the ruling clearly circumscribes the scope and limitation of adjudicatory power of the Tribunal as well as the investigatory powers of the recovery officer under the said Act. In fact, the expression regarding ouster of jurisdiction of the civil Court is merely and only to the extent of the powers given to the Tribunal and the Recovery' Officer under the said Act. This has been clarified by the Apex Court by saying that "adjudication of liability and the recovery of the amount by execution of the certificate are respectively within the exclusive jurisdiction of the Tribunal and the Recovery Officer" and it has been further observed that "no other Court or Authority much less the Civil Court or Company Court can go into **the said questions relating to the liability and the recovery** except as provided in the Act." (Emphasis supplied). It has been also explained in clear terms that the exclusion

will relate to "the said questions" and those questions are "relating to the liability and the recovery." At the same time, it has been specified that such adjudication of questions regarding the liability and the recovery could not be by any Court "except as provided in the Act." Added to this, it has been clarified that the exclusion is subject to the provisions of the Act. In other words, it would be to the extent it is excluded by the Act and not beyond the scope of the adjudication entrusted to the Tribunal under Section 17 of the said Act and for investigation under the said rules to the Recovery Officer. In other words, even in relation to the questions which are required to be dealt with by the Tribunal under Section 17 or by the Recovery Officer under Rule 11 of the said rules, the decision of the Tribunal upon the adjudication of such questions or of the recovery officer on conclusion of investigation, can be subjected to judicial review when such decision is arrived at in excess of and beyond the scope of powers of the Tribunal or the recovery officer under the said Act and the said rules respectively.

39. It is also to be noted that the powers of the Recovery Officer under Rule 11 of the said rules are restricted to the "investigation" pertaining to the

objection or claim by the third party and for that matter even by the debtor. Such investigation, undoubtedly, has to result in an order to be passed by the Recovery Officer. However, the order does not partake the nature of a decree as that can be passed by the Civil Court in execution proceedings while dealing with the claim of objection under Order 21 Rule 58 of the Code of Civil Procedure. The order of the recovery officer essentially relates to the investigation in relation to claim or objection in the proceedings for the execution of the recovery certificate and not upon the adjudication of such claim or objection. Certainly, the Recovery Officer cannot adjudicate upon the rights of the third party to the property. He is merely empowered to collect the evidence regarding the title and/or interest of the third party in the property in question in the execution proceedings, and thereupon would be obliged to exclude such property which does not disclose interest or right or title of the debtor or being subjected to security for repayment of debt. On the other hand, the civil Court has to adjudicate upon the right and interest or title of the third party making claim or objection to the adjudication of the property, and such adjudication results in an order which partakes the colour of a decree. In the

background of the basic difference and the limited powers given to the Recovery Officer under the said rules to deal with the claim and objection to the attachment and sale of the property under the said Act read with the said rules, it is apparent that the provisions of Rule 11(6) assume great importance and the same can neither be presumed to have been eclipsed nor it can be said that Section 30 would have overriding effect on the said provision in each and every case. The said non-obstante clause under Section 30 therefore would have limited effect to the extent of the powers given to the Recovery Officer. In other words, undoubtedly, any order passed on investigation by the Recovery Officer could be subjected to appeal under Section 30 of the said Act. When such order discloses a jurisdictional error which could otherwise be subjected to civil suit, the third party's right to take resort to a civil suit under Rule 11(6) of the said rules cannot be said to have been taken away by the said non obstante clause under Section 30. Undoubtedly, Section 34 of the said Act speaks about the overriding effect of the said Act under the provisions of the other statutes. But this overriding effect is in relation to the provisions of the other statutes and not in relation to the provisions of the said Act or the rules framed

thereunder. Rule 11(6) forms part of the said Act by virtue of the provisions comprised under Section 29 of the said Act. The applicability of the Rule 11(6) to the matters can arise only because the said rule stand transplanted in the said Act under the provisions of Section 29 of the said Act. Being so, the order passed in relation to the claims and rights of the third party, under no circumstances, can be said to attain finality moment the order is passed by the Recovery Officer in that regard or that it can be subjected merely to appeal under Sections 30 and 20 of the said Act. Indeed, the rule 11(6) clearly provides that such orders are conclusive subject to the result of the suit filed by the aggrieved person. Irrespective of the availability of the remedy of appeal under Sections 30 and 20 of the said Act, the rights of the third party to take up the matter before the civil Court would not stand barred and more particularly in view of the provisions of law comprised under the Rule 11(6). Neither, the decision of the Apex Court in **Allahabad Bank's case (supra)** nor that of the division bench in **Keshrimal Jivji Shah's case** decides to contrary. Undoubtedly, those decisions relate to the liability of the debtor and the guarantor or the person claiming through or under him and in relation to the property which was subject

matter of the security for repayment of debt. However, the same cannot relate to the third party's rights, which are unconcerned with the debt transaction or the matters between the debtor and the bank or financial institution.

40. In fact, in **Allahabad Bank's case (supra),** the Apex Court has nowhere held that the third party rights to a property, wherein the debtor may also right, are also affected or can be dealt with by the Tribunal or Recovery Officer under the said Act and/or the said rules. The exclusive jurisdiction of the Tribunal for adjudication and for investigation by the Recovery Officer in the course of execution of recovery certificate has to be within the scope and parameters of powers given to those authorities under the said Act and the said rules. In fact, in case of the third party's properties, the same are to be excluded in terms of Rule 11(4) of the said rules. In case of joint property, the share of the debtor to be identified and the sale can be to the extent of his share and, if required the same shall be separated from the common property before proceeding with the execution of the recovery certificate in relation to any such common property. One cannot ignore the provisions of Section 44 of the Transfer of Property

Act, 1882 in cases where the interest of the debtor in a property to be sold in execution of recovery certificate is not exclusive but that of co-ownership. Section 44 of the Transfer of Property Act provides that where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same. Beside, Section 8 of the Transfer of Property Act provides that a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property. In **Mrs.Janki Vashdeo Bhojwani & Anr. v. Indusind Bank Ltd. & Ors. (supra)**, the Apex Court has held that:-

> As it is admitted that the appellants were neither debtors nor guarantors and that the property at 38, Koregaon Park, Pune was not mortgaged in favour of the 1st respondent-bank, the authorities below and the High Court were wrong in not first deciding whether or not the appellants have any share

> in the property at 38, Koregaon Park, Pune. If the appellants have a share then their share could not have been attached and sold in execution of the decree against the other parties. Further if this was a residential premises, as claimed, then the provision of Sec.44 of the Transfer of Property Act would apply. The 1st respondent-bank could not have taken possession without first applying for partition."

The above ruling is squarely attracted in the cases where the objection or the claim is made by the third party who has no concern with the debt or the debtor, or where the property sought to be attached and sold belongs to and has therein undivided right or share in favour of the third party.

41. Reverting to the facts of the case in hand, it is apparent that undisputedly the respondent No.1 has undivided share in the suit property and she had filed her objections before the recovery officer but the same were rejected merely because her share had not been defined and that the property was not the one excluded under Section 60 of the Code of Civil Procedure. Section 60 of the Code of Civil Procedure

speaks of those properties which cannot be subjected to attachment and sale in execution of decree. Undoubtedly, it would apply to recovery certificate in view of the provisions to sub-section (2) of Section 28 of the said Act. In fact, Section 60 of the Code of Civil Procedure refers to the properties belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in his name or by another person in trust for him or on his behalf. However, exclusion of property from attachment and sale under Rule 11 of the said rules would not apply merely to those properties covered by the proviso to Section 28(2) of the said Act but it would also apply to third party's property which is in no way concerned with the debt of the debtor which is sought to be recovered under recovery certificate. In fact, Rule 11(4) expressly speaks of exclusion of such third party's properties from such proceedings.

42. It is also to be noted that the suit is primararily for partition of the share of the respondent No.1 in the suit property from the shares of other co-owners. Incidentally, since the alleged share is also sought to be attached and sold in the said execution proceedings, other consequential

reliefs are sought for. Obviously, such reliefs in the facts and circumstances of the case cannot be said to be beyond the jurisdiction of the civil court. The suit is not in relation to the debtor's right in the suit property. No relief is sought for in relation to the debt or the debtor's liability under the recovery certificate or the debtor's right in the suit property. No question which is required to be dealt with under Section 17 of the said Act has been in issue in the suit in question.

43. The provisions of law comprised under the said Act and the said rules nowhere empower the recovery officer, once having convinced from his investigation that there exists undivided share of the claimant or objector in the property in question, but merely because such share has not defined, that he could proceed to ignore his share and sell it alongwith the debtor's right in the property, without separating and/or excluding such share. Obviously, any such sale in respect of the third party's right would not be binding upon the such third party who is totally unconcerned with the debt and the security for payment of debt. Undisputedly, the respondent No.1 is in a situation similar to such third party. Being so, her claim involved in the matter does not fall within the

parameters of the scope of jurisdiction of the Tribunal under Section 17 and/or of the recovery officer under any of the provisions of the said rules, and therefore, there can hardly be any scope to contend that the Civil Court’s jurisdiction is barred to entertain the suit in question.

44. Referring to Rule 6 of the said rules, it was also sought to be contended that on sale of the property under the said rule, the same vests in the purchaser free from encumbrance. Rule 6 cannot be read independently and in isolation and ignoring the provisions of Rule 11 and particularly sub-rule (4) and (6) therefrom as has been observed hereinabove.

45. The fall-out of the above discussion, therefore, is that no fault can be found with the impugned order and there being no jurisdictional error disclosed therefrom, it does not warrant interference in revisional jurisdiction and hence the revision application fails and is dismissed. The rule is discharged with no order as to costs.